No. 78-1907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS GEORGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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The respondent, People of the State of Illinois, respectfully prays that a Writ of Certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District, entered in this proceeding on October 30, 1978, be denied.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondent submits that petitioner has failed to show any reason for this Court to exercise its discretion to grant this Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether the Appellate Court of Illinois properly found that the prosecutor's final argument did not prejudice the petitioner's right to a fair trial, where the jury was fully aware that the state had objected to Schiavone's testimony, the jury was properly instructed that arguments of counsel were not to be considered as evidence, and the prosecutor's argument did not penalize or burden any of petitioner's constitutional rights or privileges.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate and complete in most respects. However, respondent believes that additional facts, not mentioned by petitioner, were significant in the determination of the issues in this case.

First of all, the prosecutor objected in open court to the admission of Gordon Schiavone's testimony concerning his alleged conversation with petitioner. (Tr. 812)[1] The prosecutor's objection was within the presence and full hearing of the jury, and thus the jury was fully aware that Schiavone's testimony had been excluded because of the prosecutor's objection.

Petitioner himself testified that Dunaway had initially offered to kill Cynthia Runge for the petitioner during a telephone conversation with petitioner on September 12, 1975, and that petitioner then invited Dunaway to his home to discuss the matter. (Tr. 868-869) It was after this meeting that petitioner allegedly talked to Schiavone about Dunaway's statement. The petitioner thus had at least two hours to fabricate his statement before speaking to Schiavone, and for this reason Schiavone's testimony was held to be inadmissible hearsay, since it was not within the "spontaneous utterance" exception. (Tr. 812-817)

[1] "Tr." refers to the trial transcript in the state court proceedings.

In commenting upon the petitioner's alleged conversation with Schiavone, defense counsel stated during his final argument to the jury:

> "Now, if you are going to do that, then you are going to guesstimate on the testimony of Gordon Schiavone as to what his conversation was with Dennis.
>
> Dennis was able to testify as to his side of the conversation, and they want you to guess what these words meant and draw a conclusion from that.
>
> You can draw the same conclusion from what Dennis said and what you didn't hear from Gordon." (C. 1012)

During his final argument in summation, the prosecutor made the statement that petitioner now objects to:

> "You heard Dennis testify to his side of the conversation with Gordon Schiavone.
>
> You didn't hear Gordon Schiavone testify to his side of the conversation.
>
> Although throughout the course of this trial you have heard the State mention names of cases and say that this is the procedure you follow, why didn't defense ask Gordon Schiavone what he said?
>
> You all know he could have done that. He didn't do that." (C. 1037)

This argument by the prosecutor was given after the above-quoted argument by defense counsel, and was in response thereto.

Finally, the prosecutor admonished the jury during his opening argument that nothing he said was to be considered by them as evidence (Tr. 362), and immediately prior to the jury's retiring to deliberate the Court read to them the following instruction, as requested by the state:

> Opening statements are made by the attorneys to acquaint you with the facts they expect to prove. Closing arguments are made by the attorneys to discuss the facts and circum-

stances in the case, and should be confined to the evidence and to reasonable inferences to be drawn therefrom. Neither opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded. (C. 116)

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE APPELLATE COURT OF ILLINOIS PROPERLY FOUND THAT THE PROSECUTOR'S FINAL ARGUMENT DID NOT PREJUDICE THE PETITIONER'S RIGHT TO A FAIR TRIAL, WHERE THE JURY WAS FULLY AWARE THAT THE STATE HAD OBJECTED TO SCHIAVONE'S TESTIMONY, THE JURY WAS PROPERLY INSTRUCTED THAT ARGUMENTS OF COUNSEL WERE NOT TO BE CONSIDERED AS EVIDENCE, AND THE PROSECUTOR'S FINAL ARGUMENT DID NOT PENALIZE OR BURDEN ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS OR PRIVILEGES.

The petitioner's sole argument in support of his request for *certiorari* to review the Illinois Appellate Court's decision below consists of a strained attempt at analogizing the facts of this case to those in *Napue v. Illinois,* 360 U.S. 264 (1959), wherein this Court held that a criminal defendant's Fourteenth Amendment right to due process is violated when his conviction is obtained through the use of false or perjured evidence, known to be such by representatives of the State. The facts of *Napue* find no parallel in this case, however. In *Napue* and its progeny (*Alcorta v. Texas,* 355 U.S. 28 (1957); *Miller v. Pate,* 368 U.S. 1 (1967); and *Giglio v. United States,* 405 U.S. 150 (1972)), it was the knowing and deliberate introduction by the state of perjured *testimony* that was held to be unconstitutional, not an erroneous, illogical or otherwise unfounded *argument* upon the testimony of the witnesses as heard by the jury. Petitioner does not contest the fact that Schiavone's testimony concerning his

alleged conversation with the petitioner was properly excluded from evidence, since it was hearsay not fitting within the "spontaneous utterance" exception; the exclusion of this testimony was not caused by any improper nondisclosure or deception practiced by the state, but by the fact that the testimony itself was inadmissible under the Illinois rules of evidence and could not have been considered as evidence by the jury.

The prosecutor's isolated statement, that the defense could have called Schiavone to testify about the conversation, was improper; the jury itself was aware that Schiavone's testimony had been ruled inadmissible upon the State's objection, because the objection had been made by the prosecutor within the jury's presence and hearing while Schiavone was on the witness stand. However, the gist of the prosecutor's statement—that petitioner's testimony concerning this conversation was uncorroborated—was entirely true and unexceptionable, since the petitioner did not and could not bring forward any relevant and admissible evidence in support of this conversation other than his own testimony. The *inference* that defense counsel could have obtained this corroboration was incorrect; the *fact* that petitioner's testimony was uncorroborated—and could not be corroborated—was undeniably true. *Napue* is distinguishable from this case because the fact that petitioner's testimony was uncorroborated stemmed not from any bad faith nondisclosure of corroborative evidence by the state, but from the fact that his testimony could not have been corroborated by any other evidence admissible under Illinois law.

Furthermore, the prosecutor's argument was invited by the misleading final argument of defense counsel. In his summation, petitioner's attorney asked the jury to make a "guesstimate" as to what Schiavone's testimony concerning this conversation would have been, and to draw a conclusion from what petitioner said and from "what you didn't hear from Gordon (Schiavone)". (Tr. 1012) In response, the prosecutor reminded the jury that they had heard petitioner's version of the

conversation, but not Schiavone's, clearly admonishing them to consider only the facts in evidence. It is well settled under both Illinois law (*People v. Vriner,* 74 Ill. 2d 329 (1978)) and federal law (*United States ex rel. Clark v. Fike,* 538 F.2d 750 (7th Cir. 1976) that a defendant who opens the door to such a subject by misleading argument cannot object when the state advances its own argument in reply.

Petitioner's counsel has candidly admitted that he is aware of no case in which misrepresentation during argument alone has been considered by this Court. (Petitioner's Petition, p. 9) Indeed, it is a well-settled rule in this Court and the federal courts that the issue of improper final argument is a matter of state law alone, and is not of constitutional dimension. *Frank v. Mangum,* 237 U.S. 309 (1914); *Setser v. Welch,* 159 F.2d 703 (4th Cir. 1947). Research by your respondent has disclosed only two reported cases where a prosecutor's final argument alone was held to violate a defendant's constitutional rights, and in each case the argument was condemned for having imposed a penalty or burden upon the defendant's exercise of another constitutional right or privilege.

In *Griffin v. California,* 380 U.S. 609 (1965), the prosecutor stressed the defendant's failure to take the stand and testify in his own defense, and urged upon the jury the inference that such failure demonstrated the defendant's inability to deny his guilt. Holding such prosecutorial comment violative of the Fifth Amendment privilege against self incrimination, this Court deemed the statement "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (380 U.S. at 614)

In *United States ex rel. Macon v. Yeager,* 476 F.2d 613 (3rd Cir. 1973), a prosecution for murder, the prosecutor argued that defendant's telephone call to his attorney, shortly after being involved in an altercation resulting in another man's death, raised an inference of his guilt. In holding that the

prosecutor's argument penalized the defendant for the exercise of his constitutional right to counsel, the court cited this Court's decision in *Griffin, supra,* and stated:

> "The *Griffin* Court focused its inquiry upon whether the petitioner had been 'compelled . . . to be a witness against himself,' " U.S. Const. Amend. V, whereas in the present case, the relevant constitutional provision called into question is the Sixth Amendment right to counsel. For the purpose of the 'penalty' analysis, however, we perceive little, if any valid distinction between the privilege against self-incrimination and the right to counsel. It can be argued, with equal vigor and logical support, as to either the *Griffin* situation or the present case, that a prosecutor's comment seeking to raise in the jurors' minds an inference of guilt from the defendant's constitutionally protected conduct constitutes a 'penalty' on the free exercise of a constitutional right." (476 F.2d at 615)

As stated above, in the instant case there was no deliberate misrepresentation or suppression of fact by the prosecution, nor did the state's final argument impose a penalty or burden upon the petitioner's exercise of a constitutional right. The defect in the prosecutor's argument concerned a question of admissibility of evidence under Illinois law, and, according to the findings of the Illinois Appellate Court, the defect was fully apparent to the jury and could not have influenced their verdict.

A ruling such as that requested by petitioner, that would invalidate as a matter of constitutional law an otherwise well-founded criminal conviction based upon a prosecutor's spontaneous misstatement during final argument—a misstatement of local state law and of itself having no constitutional significance—would have a heavy negative impact upon the desired finality of judgments and would not aid in deterring deliberate misconduct on the part of the state. Nor would such a rule be susceptible of reasonably exact application, except in cases where the prosecutor's argument directly penalizes a recognized

constitutional right. It is the proper function of attorneys, both for the prosecution and for the defense, to argue all reasonable inferences arising from the evidence; the rule espoused by petitioner would require a finding of constitutional error if the prosecutor's argument were illogical, or not fairly supported by the facts, or founded upon an innocent misinterpretation of the facts. It is the proper function of the jury, however, to judge if the inferences propounded by counsel are valid and supported by the facts, based upon the jury's understanding of the evidence admitted. In the instant case, the jury heard all the relevant and admissible evidence concerning the petitioner's behavior and state of mind during his solicitation of Cynthia Runge's murder, and they were properly cautioned by the trial judge against treating statements of counsel as evidence. It is clear, therefore, that the prosecutor's isolated misstatement did not deny petitioner his right to a fair trial.

CONCLUSION

For the foregoing reasons, People of the State of Illinois, Respondent, respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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